



Sample Due Diligence Policy & Protocols

Re: Wage Theft Prevention

Wage theft is a construction industry problem that entails the unethical treatment of workers, creates uninsured health and safety risks, and undercuts legitimate bidding on projects. State and local authorities recently have toughened their laws outlawing and punishing wage theft, and are considering further steps and enforcement.

Construction firms may be caught unaware that its subcontractors, or lower tier subcontractors, are engaging in these illegal practices, and the firm could become exposed to significant penalties for not being aware, including civil and criminal liability against the organization and its officers. The following compliance policy and protocols are meant as a guide that a company may use when it recognizes the need to review or improve its internal processes and prevent wage theft among subcontractors of all tiers.

Definitions

Wages is defined broadly to include all earned monies, benefits and fringe benefits, paid time off, allowances, and per diem.

“Wage Theft” occurs when an employer fails to pay a worker Wages with an intent to defraud or by willful blindness. Examples of Wage Theft include (a) paying a worker less than the rate of pay required by contract and legal authority (e.g. statute, rule, ordinance, policy), except for appropriate deductions, garnishments or withholdings; (b) overstating paid Wages on receipts or other records; (c) requiring rebates or refunds from workers; and (d) misclassifying workers as independent contractors.

Outline of Model Company Policy

As with any compliance program, a company should create a policy that is clear, communicated, provides for training and corporate culture support, sets standards to evaluate risks and monitor for violations, explains how to report suspected violations, and provides for disciplinary action including termination for violation. The key to reducing risk is awareness, reporting, ability to act when misconduct is confirmed, and diligence to keep this compliance program engaged. The following outlines points to consider including in a compliance policy and program:

1. Create internal policy designed to create a culture of compliance
 - a. Define wage theft broadly to include failing to pay wages by any mechanism, worker misclassification, and tax fraud.
 - b. Communicate the problems to society, business, and employees that wage theft entails.
 - c. Tone at the top
 - i. The message should come from senior leadership that explains the company’s commitment to combat worker misclassification, wage theft, and tax fraud
 1. Explains economic cost to worker and company
 2. Reinforces company’s moral commitment against such practices
 - d. Establish person/team to lead compliance efforts and define:
 - i. How investigations will be conducted



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- ii. When/who has authority to hire third party consultant to investigate
 - iii. How decisions will be made
 - e. Establish communications
 - i. Where an employee who witnesses or believes a violation is occurring may report his/her concerns
 - 1. A goal should be to have reporting easy and manages so that the report will get to the appropriate person. Options should be provided in case the employee fears retaliation, such as manager, site supervisor, HR, and corporate officers.
 - 2. Optional 800 hotline to report
 - ii. Commitment against retaliation for reports made in good faith should be communicated and reinforced when a report is made.
 - iii. Be clear that the results of investigation may not necessarily be shared
 - f. Reward & recognition program
 - i. Publicize, reward & recognize reports where wage theft was prevented, exposed, redressed, or trainings occurred.
- 2. Training
 - a. For employees who will run the program to better understand the policy, legal risks, and compliance efforts
 - b. For all employees to understand the problem, company's interest in reporting and preventing wage theft, identify how to report concerns, and confirm that report will be reward, not sanctioned.
- 3. Require compliance of subcontractors in contract language (See AGC Model Contract Language below)
 - a. Subcontractor currently is in compliance with and/or has cured past violations of legal standards
 - i. A state's responsible contractor act (e.g. Minnesota Statute 16C.285, subd. 3) provides a list of standards that a contractor should fulfill,
 - ii. Specifically should include compliance with employee protection statutes such as payment of required rates of pay without discounts, OSHA, worker compensation, unemployment insurance,
 - iii. Also, should attest that subcontractor is registered with Secretary of State (has certificate of authority to transact business in Minnesota), Department of Revenue, and Department of Employment and Economic Development,
 - b. When a concern or question is raised, Subcontractor should agree to cooperate and provide records that may be helpful to review, investigate or audit subcontractor at its own expense
 - c. Agree that willful blindness is not a defense
 - d. Contractor can hold subcontractor in material breach for noncompliance



4. Contractor's due diligence of subcontractors
 - a. Rate risks that subcontractor may be engaging in wage theft directly or through its subcontractors
 - i. Factors that deter or prevent worker misclassification, wage theft, tax fraud
 1. Union signatory
 - a. Scope of work performed entirely by union employees with union officials ensuring proper money paid.
 2. Project covered by a Project Labor Agreement requiring scale wages and benefits be paid
 3. Project covered by prevailing wage laws that require certified payroll records
 - ii. Subcontractor's reputation suggests past problems or no past problems
 1. Subcontractor's reputation (eg. Hoovers, BBB, union business agent, press)
 2. Court filings
 3. Whether subcontractor self-performs or subcontracts
 - iii. Requested background information for subcontractors who are unfamiliar, have yellow grades based on review, contractor has any basis to suspect, or other reason.
 1. Proof of worker's compensation & unemployment insurance,
 2. Copy of subcontractor's code of conduct and policy against worker misclassification, wage theft, and tax fraud, and/or
 3. Attestation that subcontractor has reviewed its subcontractors and requirements passed through to its subcontractors
 - b. If yellow or red flags (eg gap analysis between subcontractor's controls and best practices) suggest there may be a problem, dig deeper
 - i. Run credit report
 - ii. When subcontractor was founded & in what jurisdiction
 - iii. If privately held, list of owners/principals including percentage of ownership
 - iv. Identify banking partners and payroll administrator
 - v. List of subcontractor's subcontractors
 - c. Perform spot checks, prioritizing higher risk subcontractors
 - i. Inspect jobsite
 - ii. Interview superintendent and/or supervisors
 - iii. Interview workers on jobsite
 - iv. Review records
 - d. If there is a good faith basis to believe a violation has occurred, then



- i. Contractor should have the right to conduct a deeper investigation including auditing subcontractor's compliance. This investigation may include reviewing records and interviews that may include business ownership and incorporation, banking, workers' compensation and unemployment insurance, payments to workers and its subcontractors, relationship with subcontractors suspected of brokering labor, and commitment to protect workers' rights.
 - ii. Subcontractor should be required to cooperate at its expense with investigation conducted by contractor or third-party investigator
 - iii. Subcontractor will take reasonable steps to respond appropriately to misconduct when detected and prevent further misconduct
 - iv. Right to terminate relationship with subcontractor for subcontractor's material breach and hold subcontractor liable for damages
 - v. Results of investigation may be referred to government authorities
- 5. Systematic review of policy
 - a. Ensure not a 'check the box' compliance
 - b. Document and report to senior leadership monthly, quarterly, or annually, depending on contractor's history, level of concern, reputation or another basis
 - i. Number of inspections conducted and results
 - 1. What found
 - 2. Interviews with superintendents, supervisors, workers, and others.
 - ii. Number of investigations conducted, with whom, and results
 - iii. Number of reports received and results
 - iv. Reward and recognition instances
 - c. Provide a report at the Board level that periodic reviews were made and whether any problems were found.
 - d. Optional: engage third party to periodically (annually or biannually) policies, procedures, compliance, engagement
 - i. Report to senior leadership
 - ii. Communicate review & conclusion to company

Model Contract Language

Language should be inserted into all subcontract agreements requiring subcontractors of all tiers to affirm that they are not engaged in worker misclassification, wage theft, or tax fraud agreeing to cooperate and provide appropriate information to allay suspicions and permitting termination for cause when violations occur. The following is an example of such language:

The Parties agree as follows to deter wage theft. Wages is defined broadly to include all earned monies, benefits and fringe benefits, paid time off, allowances, and per diem. "Wage Theft" occurs when an employer fails to pay a worker Wages with an intent to defraud or by willful blindness. Examples include (i) paying a worker less than the rate of pay required by contract and legal authority (e.g., statute,



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rule, ordinance, policy), except for appropriate deductions, garnishments or withholdings; (ii) overstating paid Wages on receipts or other records; (iii) requiring rebates or refunds from workers; and (iv) misclassifying workers as independent contractors. Subcontractor agrees that knowledge of Wage Theft by its field supervisors or leads may be imputed to Subcontractor. Upon a good faith belief that Wage Theft has occurred on a Project and is related to Subcontractor, Contractor may investigate or audit Subcontractor. Subcontractor will cooperate with the investigation or audit at its expense by, among other things, (i) providing Contractor with information, records, and interviews that may include business ownership and incorporation, banking, workers' compensation and unemployment insurance, payments to workers and its subcontractors, relationship with subcontractors suspected of brokering labor, and commitment to protect workers' rights; and (ii) attesting in writing that it reasonably monitors its subcontractors of all tiers for compliance and has no good faith basis to believe Wage Theft has occurred by Subcontractor or Subcontractor's subcontractors of any tier. If Subcontractor refuses to cooperate or if Contractor concludes in good faith that (i) Subcontractor directly or through its subcontractors has engaged in Wage Theft, (ii) the violation is not a de minimus mistake that has been remediated, and (iii) Subcontractor knew or should have known of the violation, then Contractor may terminate without opportunity to cure some or all relationships with Subcontractor for Subcontractor's material breach and/or refer the matter to government authorities. Subcontractor should report to Contractor any good faith suspicion of violation by any other provider of labor on the jobsite and agrees to cooperate in an investigation or audit of another of Contractor's subcontractor.